No. 80 - 824

Office - Supreme Court, U.S.
FILED
OCT 6 1981
ALEXANDER L. STEVAS
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In The

Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners.

VS.

RUSSELL RICHARD DODSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether a county-employed public defender acts under color of state law in representing indigent defendants so as to be subject to suit under 42 U.S.C. § 1983.

2. Whether a county-employed public defender appointed to represent indigent defendants enjoys an absolute immunity, rather than a qualified immunity, from suits brought under 42 U.S.C. § 1983 for actions taken while representing such indigent clients.

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ARGUMENT

I

COUNTY EMPLOYED PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW WITHIN THE MEANING OF 42 U.S.C. §1983 DURING THE COURSE OF REPRESENTING INDIGENT CRIMINAL DEFENDANTS.

A. THE ACTIVITIES OF THE PUBLIC DEFENDER CHALLENGED HEREIN DO NOT CONSTITUTE STATE ACTION SINCE POLK COUNTY DID NOT SIGNIFICANTLY FOSTER OR ENCOURAGE THE PARTICULAR CONDUCT, AND DOES NOT INVOLVE OR ENTERTWINE ITSELF IN THE ACTUAL REPRESENTATION OF INDIGENT PERSONS BY PUBLIC DEFENDERS.

The threshold question in determining federal jurisdiction under the Civil Rights Act is whether sufficient state action is present to remove the challenged activity from the sphere of private action which is beyond the reach of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1 (1948). There is no clear-cut method of answering this question, since, due to the variety of governmental activities, state action can be assessed only in the framework of the particular

circumstances and facts before the Court. Burton v. Wilmington Parking Authority, 365 U.S. 715, at 725-26 (1961). Respondent Dodson and amicus curiae United States contend that the involvement of the state and Polk County in the implementation, funding, and supervision of the public defender system means that public defenders act under color of state law for the purposes of §1983. (Respondent's Brief, p. 5); (United States' Brief, p. 7). Polk County suggests that §1983 is not applicable simply because private choices are enabled to be carried out because of the backing of the state, and that where the impetus for the alleged deprivation is private the state must have significantly involved itself with the violation for §1983 to apply.

Numerous tests have been employed to

determine whether a person acts under color of state law for the purposes of the Civil Rights Act. In a pioneer decision on the question of state action, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Supreme Court emphasized that only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance, and that the fashioning and applying of a precise formula for recognition of state responsibility is an impossible task.[1] In Burton, supra, the Court relied on the fact that a state agency had so far insinuated itself into a position of interdependence with the discrimination practiced by a private party that it had to be recog-

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[1] Burton v. Wilmington Parking Authority, 365 U.S. 715, at 722 (1961).

nized as a joint participant in the challenged activity, which, therefore, could not be considered so purely private as to fall outside the scope of the Fourteenth Amendment.[2] The key factor in the decision was the "symbiotic" or mutually beneficial relationship between the otherwise private party and the state.

More recently, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Supreme Court expounded further upon the state action question, and held that only involvement which supports and promotes the challenged conduct, or the activity in the course of which the challenged denial of rights occurred, justifies the attachment of constitutional standards. In rejecting a "state

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[2] Burton, supra, at 725.

action" claim, the Court observed:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations', Reitman v. Mulkey, 387 U.S. 369, 380 . . . (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."
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> Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 173 (1972).

The limits of the theory were most recently explored by the Supreme Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), involving a public utility's allegedly improper termination of service to a customer. In suggesting that the action in question must have been associated traditionally with

sovereignity or the exclusive prerogative of the state to constitute state action[3], the Court said that state action requires that there be a "sufficiently close nexus" between the state and the challenged activity for the activity to be attributed to the state itself for the purposes of §1983. Jackson, supra, at 351. In other words, it must be determined whether the action can "be fairly treated as that of the state itself".[4]

The Supreme Court has thus made clear that neither general government involvement nor even extensive state regulation is sufficient for a finding of state action.[5] Not all government

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[3] Jackson v. Metropolitan Edison Co., 419 U.S. 345, at 352-353 (1974).

[4] Jackson, supra, at 351.

[5] Cannon v. University of Chicago, 559 F.2d 1063, at 1069 (7th Cir. 1976).

involvement in private activity, then, is constitutionally meaningful and of such a nature as to justify the imposition of constitutional limitations. Only government support or promotion calls forth constitutional obligations. A finding of state action requires the state to affirmatively support and be directly involved in the specific conduct which is being challenged.[6]

Respondent Dodson and amicus United States direct their argument to suggesting that the public defender's activities constitute state action since the office is funded directly by the county, and because the function which public defenders fulfill (the defense of indigent criminal defendants) constitutes an

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[6] See, Washington v. Davis, 426 U.S. 229 (1976); Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968).

essential state function under the Sixth Amendment.[7] The contention is that the physical and financial ties between the state and the public defender's office makes them inextricable partners in a joint effort.

However, this theory falls short of its intended mark when compared to the proposition offered and decisively rejected in the Moose Lodge decision. The finding of financial involvement and an exchange of benefits does not automatically make the result in Burton, supra, applicable.[8] The office of the public defender and the county cooperate closely in working toward a shared goal, but they are not so closely tied together as to be considered "joint venturers."[9]

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[7] Respondent's Brief, p. 21; United States' Brief, p. 15.

[8] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 173 (1972).

[9] Moose Lodge, supra, at 177.

While clearly concerted action, or closely entertwined conduct, of state officials and private parties may establish sufficient state involvement to satisfy §1983 jurisdictional requirements, the county's involvement in the public defender's activities herein does not approach the level of entanglement that requires this Court's reaching the Burton result.

The ultimate question, as refined by Moose Lodge and Jackson, under any and all of the state action theories, is whether the state, through regulation, financial assistance, or any other action, "can be said to have sanctioned, fostered, encouraged or identified itself" with the specific practices at issue.[10] The Supreme Court has made

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[10] Player v. State of Alabama, Dept. of Pen. & Sec., 400 F.Supp. 249, at 263 (D. Ala. 1975).

clear that the governmental involvement necessary to meet the "state action" requirement under §1983 must be "affirmative support measured by its direct contribution to the conduct at issue." Cannon v. University of Chicago, 559 F.2d 1063, at 1070 (7th Cir. 1976). To be regulable under constitutional standards through §1983, the private activity which a plaintiff challenges must be supported by state action that significantly fosters or encourages that activity. Driscoll v. International Union of Operating Engineers, Local 139, 484 F.2d 682, 690 (7th Cir. 1973).

In the matter at hand, Polk County has lent significant support to the operation of the public defender's office; it cannot, however, be found to have encouraged or given support to the specific practices challenged herein.

Indeed, Mr. Dodson's complaint contains no allegation that Polk County affirmatively supported or expressly approved of any of those specific practices challenged herein, or even had actual knowledge of the alleged deprivation of rights. Nor has Mr. Dodson established that the county made it a practice to intervene in any significant way with the internal operations of the pulbic defender's office with respect to the actual representation of indigents. On the other hand, it is noteworthy that Polk County plays no significant role in the policy-making of the public defender's office. Aspects of the operation which relate directly to the representation of indigents are left to the discretion of the office's management, much as government contractors are left free to manage their own affairs so long as they pro-

vide the services for which they have contracted. Polk County in no way controls the office's actual representation of clients to the extent it is a "joint venturer" in the enterprise.[11]

Although the Polk County Offender Advocate's Office has undertaken to make available to indigents legal services which the Constitution compels local governments to provide, its history, organization and management definitely establish that it is a private actor within the jurisdictional confines of §1983. Under its charter, Polk County retains a minimum of control over it, and the office's obligation is to its clients and not to the county. In this case, where there appears to be no state

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[11] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 176-77 (1972).

encouragement or support of the specific conduct being challenged, and where there is no indication that the state exercises any significant control over the actual representation provided indigents by public defenders, it would be improper to divest the Offender Advocate Office of its private character.

B. THE "FUNCTIONAL TEST" PROPOSED BY AMICI NLADA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SHOULD NOT BE CONSIDERED BY THE COURT.

In their amici brief filed herein, the NLADA and the National Association of Criminal Defense Lawyers urged the Court to adopt a functional test in determining whether or not public defenders act under color of state law for §1983 purposes. Under such a test, "the actions, or functions, of the public defender, rather than the role or position occupied, would determine whether

the jurisdiction of the Court can be invoked because the wrongdoing occurred under color of state law." The above-mentioned amici request the Court to rule that public defenders do not act under color of state law while in the course of individual client representation, but do act under color of state law where the alleged wrong is committed pursuant to policies of office administration, a supervisory authority, or a funding source.

The proposed functional test of the amici is beyond the scope of the questions presented to the Court. The Court has been asked to pass solely upon the question of whether public defenders act under color of state law in the course of representing indigents. Whether or not administrative practices or supervisory involvement bring a defender's

conduct within the "state action" requirement is not an issue the Court has been requested to decide, and was not litigated in the Eighth Circuit below. In general, counsel may not add to the substance of the questions previously assigned or specified, and the Court will limit its consideration of the case "to the questions specifically brought forward by the petition". General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 177-78 (1938). Those questions must, in addition, properly arise in the record, Tyrrel v. District of Columbia, 243 U.S. 1 (1917), and must have been urged and briefed in the court below. California v. Taylor, 353 U.S. 553, 557 note 2 (1957). Since this Court is limited to the issues presented in the Petition and in the Court below, the proposed test of the amici should not be considered by it.

II

ABSOLUTE IMMUNITY FROM §1983 LIABILITY IS JUSTIFIED FOR PUBLIC DEFENDERS; THE PUBLIC INTEREST AND THE INTERESTS OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY A GRANT OF ABSOLUTE IMMUNITY RATHER THAN A QUALIFIED IMMUNITY.

A. THE LACK OF A COMMON LAW HISTORY OF IMMUNITY DOES NOT NECESSARILY PREVENT ITS EXTENSION TO PUBLIC DEFENDERS; PUBLIC POLICY CONSIDERATIONS SIMILAR TO THOSE UNDERLYING THE COMMON LAW IMMUNITY FOR JUDGES AND PROSECUTORS SUPPORT A RULE OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS UNDER §1983.

Only after state action is found is it appropriate to consider the possibility of a grant of immunity to an official. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court extended absolute immunity under §1983 to public prosecutors, and in so doing clarified the appropriate method to determine immunity under that statute. The Court, stating that §1983 "is to be read in harmony with general principles

of tort immunities and defenses"[12], provided a two-part test for determining whether a given party enjoys immunity, and if so, the scope of the protection: (1) whether the relevant official or his counterpart by analogy enjoyed common law immunity, absolute or qualified, and (2) whether policy considerations similar to those underlying common law immunity warrant any immunity under §1983.[13]

In his Brief, Mr. Dodson has taken the position that since the office of public defender is without any common law precedent, the first prong of the Imbler test is dispositive and public defenders should enjoy no absolute immunity. (Respondent's Brief, p. 23). However, while recognizing that Pierson v.

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12 Imbler v. Pachtman, 424 U.S. 409, at 418 (1976)

13 Imbler v. Pachtman, 424 U.S. 409, at 421-424 (1976)

Ray, 386 U.S. 547 (1967), and Imbler v. Pachtman, 424 U.S. 409 (1976), rest in large part on the extension of common law principles in granting complete immunity to judges and prosecutors, Polk County asserts that the absence of a common law history of immunity for public defenders does not dictate a finding that absolute immunity should not be granted such defenders.

The extension of absolute immunity to legislators[14], judges and prosecutors was justified by both a significant common law history and obvious public policy considerations. Thus, in Pierson v. Ray[15], supra, the Supreme Court relied upon its decision in Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1872),

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[14] Tenney v. Brandhove, 341 U.S. 367 (1951).

[15] Pierson, supra, granted judges absolute immunity from actions brought under 42 U.S.C. §1983.

for not only an historical analysis of the common law immunity granted judges, but also for an in-depth discussion of social considerations underlying that immunity. In Bradley, supra, the Court emphasized five factors that in its view justified an absolute immunity for judges:

1. The need for a judge to "be free to act upon his own convictions, without apprehension of personal consequence to himself";

2. the controversiality and importance of the competing interests adjudicated by judges and the likelihood that the losing party would feel aggrieved and wish to challenge the decision maker;

3. the self-protective "record keeping" to which judges would be driven in the absence of absolute immunity;

4. the availability of alternative remedies, such as appeal and impeachment, for judicial wrongdoing; and

5. the ease of alleging bad faith, which would then require "the same vexatious litigation upon such allegations."[16]

[16] Bradley v. Fisher, 80 U.S. (13 Wall) 335, at 347-354 (1872).

In Imbler, supra, the Court extended absolute immunity under §1983 to prosecutors for very similar reasons as it awarded immunity to judges. Again, the Court heavily stressed the considerations of public policy underlying prosecutorial immunity. Six factors were found to justify a grant of absolute immunity to prosecutors faced with §1983 suits:

1. The concern that harassment from §1983 litigation "would cause a deflection of the prosecutor's energies from his public duties";

2. the possibility that §1983 liability would cause prosecutors to shade their decisions instead of exercising the independence of judgment required by their public trust;

3. the fear that §1983 liability "would open the way for unlimited harassment and embarrassment of the most conscientious prosecutors";

4. the recognition that public trust in prosecutors' offices would suffer if they were constrained in making every decision by the consequences of potential liability in a suit for damages;

5. the fact that the presentation of complex issues in a §1983 action would often require "a virtual retrial of the criminal offense in a new forum", and the resolution of technical matters by a lay jury; and

6. the availability of a number of post-trial procedures for the allegedly wronged criminal defendant, including the remedial powers of the trial judge, appellate review, and state and federal post-conviction remedies.[17]

As seen, the extension of absolute immunity by the Supreme Court to judges and prosecutors was based on a common law history of immunity and obvious social considerations. There is, of course, no traditional immunity for a public defender since the job is not a traditional one; the obligation of the federal government and the states to provide counsel to indigent defendants is a recent outgrowth of the case of Gideon v. Wainwright,

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17 Imbler v. Pachtman, 424 U.S. 409, at 423-427 (1976).

372 U.S. 335 (1963). As a result, the common law analysis test of Imbler, supra, cannot be utilized to determine whether public defenders should be accorded absolute immunity under §1983.

However, the lack of a common law history of immunity should not necessarily prevent its extension to public defenders.[18] Although utilized as an important inquiry, the first prong of the Imbler test cannot reasonably be set forth as a mandatory requirement.[19] Indeed, the Imbler opinion placed its greatest emphasis upon the public policy considerations underlying the common law immunity for prosecutors.[20] It is there-

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[18] Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978).
Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).
Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972).

[19] Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978).

[20] Imbler v. Pachtman, 424 U.S. 409, 424-26 (1976).

fore necessary, under the Imbler analysis, to turn to the second level of inquiry, more heavily stressed by the Supreme Court, involving considerations of public policy. In so doing, it is inescapable that justification for an absolute immunity for public defenders is predicated upon analogy and social considerations.

The proper analysis is to look at the Court's justification for judicial and prosecutorial immunity to identify factors that the Court regards as justifying absolute immunity for officials. And when one does that, one cannot help but be struck by the extent to which those factors justify no less an immunity for public defenders than for judges and prosecutors.

Indeed, public defenders, no less than judges, must be free to act object-

ively and without regard to personal considerations. There is no reason to believe that those defendants who are convicted and sentenced are any less aggrieved or disposed to challenge the adequacy of the legal representation of their public defender than to bring suit against their trial judge. The "record-building" response to fear of liability is not limited to judges; undoubtedly, it is a particular temptation for all officials allotted only a qualified immunity. The array of alternative remedies available to correct public defender misconduct is just as broad as those available for judicial wrongdoing. And a plaintiff's ease in alleging bad faith in a §1983 complaint - and getting to trial on the issue - is at least as great with respect to public defenders as it is with judges.

Like the prosecutor, the public defender needs freedom to make difficult decisions, such as when to decline to press frivolous claims and how to best make strategic decisions as to a particular defendant.[21] The constant threat of disappointed indigents pressing §1983 actions against public defenders would have a chilling effect upon their decision-making. The defense of even frivolous §1983 suits would consume the energy of state subsidized attorneys which would better be devoted to representing the interests of their clients. Because the state pays for the services of the public defender, there are no economic brakes on an indigent's demands to pursue an appeal or related action. The threat of §1983 liability might well

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[21] Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976).

force public defenders to abandon their good judgment and pursue such frivolous suits on appeal.[22] Finally, as in the case of the public prosecutor, an award of absolute immunity to public defenders would not deprive a defendant of all redress, since he has the alternative remedies of direct appeal, state post-conviction relief, or federal habeas corpus.[23]

When one contrasts the circumstances under which the decisions of public defenders must often be made (momentarily; with broad discretion and little guidance or information; under great stress and uncertainty; in potentially unfriendly surroundings; and under severe resource constraints) with those under which judges render decisions (at

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[22] Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976).

[23] Brown v. Joseph, 463 F.2d 1046, 1049 (3rd Cir. 1972).

their own pace; with discretion narrowed and guidance provided by precedent and statutory language; with voluminous records and briefs; enjoying great deference; in friendly and familar surroundings; and able to treat time and information as "free goods"), it is difficult to resist the conclusion that §1983 suits against public defenders are more likely to be brought and to prevail than in the case of judges. A similar analogy can be made with the situations of public prosecutors. If the merest possibility that judges and prosecutors will be sued suffices to justify absolute immunity for them - and the Court has taken the opinion that it does - it remains tc be demonstrated why a higher risk to public defenders justifies anything less.

To date, four out of the five Circuits which have squarely addressed the issue

of whether a public defender is absolutely immune from §1983 liability have decided in the affirmative. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977). Furthermore, both the Second Circuit and the Tenth Circuit, while not specifically deciding the issue, have cited with approval those cases finding public defenders absolutely immune under the Civil Rights Act.[24] The Eighth Circuit below is the lone exception. The accepted rationale for such grants of absolute immunity has been that public defender activities in representing an

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[24] Housand v. Heiman, 594 F.2d 923 (2nd Cir. 1979); Brown v. Schiff, 614 F.2d 237 (10th Cir. 1980).

indigent defendant are as closely associated with the judicial process as are prosecutors and judges, and the policy considerations underlying prosecutorial and judicial immunity enunciated in Imbler, supra, and Bradley, supra, are equally important in the case of public defenders. The public in general, and the criminal defendant in particular, will suffer from any rule that would cause the public defender to gauge his conduct by the possibility that the client could bring a §1983 action against him if he were dissatisfied with the outcome of his trial. The inhibiting effect it would have on the public defender's management of a criminal defense would far outweigh any social utility of allowing a §1983 action for damages against the defender.

B. THE SUPREME COURT'S DECISION IN FERRI V. ACKERMAN IS NOT DISPOSITIVE OF THE ISSUE AT BAR, AND IS NOT AUTHORITY FOR THE PROPOSITION THAT ABSOLUTE IMMUNITY IS NOT JUSTIFIED FOR PUBLIC DEFENDERS UNDER §1983.

The Supreme Court recently considered the immunity question, although not in a §1983 context, for appointed defense counsel in Ferri v. Ackerman, 444 U.S. 193 (1979). There, the Court ruled that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice action brought against him by a former client. The Respondent submits that the fact that federal law did not mandate an absolute immunity for attorneys appointed pursuant to the Federal Criminal Justice Act[25] and sued in a state tort action·

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[25] Criminal Justice Act of 1964, 18 U.S.C. §3006A (1976).

is dispositive of the issue herein. (Respondent's Brief, p. 25).

Polk County takes issue with such a conclusion. The very narrow issue presented to the Court in Ferri, supra, was whether federal law in any way preempts the freedom of a state to decide the question of immunity in accordance with its own laws.[26] The specific inquiry was whether federal law requires a state to accept the defense of immunity in a state malpractice action. In answering this question in the negative, the Court noted that while the legislative history of the Act revealed a desire to compensate appointed counsel, it did not indicate an intent to federalize such lawyers.

Ferri, supra, is quite distinguishable from the case at bar. The Supreme Court's analysis regarding an appointed

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[26] Ferri, supra, at 197.

attorney's immunity in a state malpractice action does not apply by analogy to the situation herein. The distinctions are obvious. The public defender is not in the same situation as the private lawyer in Ferri, appointed to represent an indigent in a single federal criminal trial; he is an individual whose sole duty it is to fulfill the state's responsibility to provide free legal assistance to indigents accused of committing crimes, and who deals with hundreds of such cases every year. The unique nature of the relationship between the public defender and his client provides a compelling justification for treating the public defender differently from the private attorney appointed in Ferri. Section 1983 actions against public defenders, significantly the suit at hand, are essentially tort ex contractu

claims, and can just as easily be brought in state court in either tort or contract. It is important, then, to recognize that the public defender, unlike his privately appointed counterpart in Ferri, is not free to contract in any way with his client. Notably, the public policy considerations supporting absolute immunity for public defenders (recited in Section II-A of this Reply Brief) are simply not as compelling when applied to a private attorney appointed by the Court to partake in a single criminal trial. And, as the Chief Justice has noted, "the public defender has a more difficult task in securing and holding the confidence of his client" than private counsel. Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 2, at 6 (1969).

In addition, Ferri's inquiry was narrowed to the pragmatic confines of what present federal law provides with respect to state malpractice litigation. Procedural aspects such as choice of law and interpretation of federal common law formed the basis for the Court's decision. Constitutional questions, social policy, and a balancing of interests were not determinative factors in the result.[27] In summary, the Supreme Court in Ferri simply found that nothing in the purpose, the language, or the history of the Criminal Justice Act dictated that any state must accept the defense of immunity in a state malpractice action. The public policy considerations supporting absolute immunity which were relied upon

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[27] Bruggeman, Criminal Justice Act of 1964 - State Malpractice Suit Against Appointed Counsel, Ferri v. Ackerman, 13 Akron Law Rev. 745, at 751 (1980).

in Imbler v. Pachtman[28], and which have been discussed at length by other federal courts[29], were simply not controlling since Ferri involved neither a state public defender nor a federal claim.

In an issue that is heavily laden with policy questions and social considerations, the Supreme Court in Ferri chose to adopt a restrained position. However, while by-passing strong arguments of public policy, the Court was not oblivious to their existence or their merit. Indeed, the Court seemed to question the wisdom of allowing an indigent to sue his publicly provided and financed attorney, and clearly left the door open for change through legislative

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28 Imbler v. Pachtman, 424 U.S. 409 (1975).

29 Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978).

action.[30]

In the matter at hand, Polk County asserts that the rationale adopted by the Court in Ferri is not controlling when applied to this §1983 claim against a county public defender. It is more important to consider the duties and responsibilities of the public defender, and how he might be impeded in their performance if absolute immunity is not extended to him. Barr v. Matteo, 360 U.S. 564, at 575 (1959). The public's interest in providing - indeed, its duty to provide - free legal assistance to indigents accused of committing crimes will be better served by extending absolute immunity to public defenders than by withholding it. The case of any person, no matter how unpopular or offensive he,

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30 Ferri v. Ackerman, 444 U.S. 193, at 205 (1979).

his opinions, or his cause may be, if assigned to the public defender must - and we would not argue otherwise - be advocated as strenuously as possible. However, as a matter of public policy, it is imperative that the public defender not be placed in a position where he is compelled to gamble on the outcome of a case, with his own personal liability under §1983 hanging in the balance.

C. THE ROLE OF THE PUBLIC DEFENDER IN THE CRIMINAL JUSTICE SYSTEM IS NOT ADEQUATELY PROTECTED BY A GRANT OF A QUALIFIED IMMUNITY FOR ACTIONS BROUGHT UNDER 42 U.S.C. §1983; A RULE OF ABSOLUTE IMMUNITY IS NECESSARY TO PROTECT PUBLIC DEFENDERS FROM DISSATISFIED INDIGENT CLIENTS.

In his Brief, Respondent Dodson contends that "a qualified immunity is sufficient protection for discretionary acts" by public defenders (Respondent's Brief, p. 28), and that the public interest is best served by granting public

defenders only a qualified immunity under 42 U.S.C. §1983. The Respondent takes the questionable position that an award of a qualified immunity is "a fair and reasonable compromise between the interests of society and the public defender and his client." (Respondent's Brief, p. 34). This view is nothing more than a cursory approval of the concept of a qualified immunity, and fails to recognize the doctrine of absolute immunity as a rule designed to protect the public.

To the public defender confronted with the risk of being sued under §1983, the difference between an absolute and a qualified immunity is crucial. Indeed, the fate of an official with only a qualified immunity depends upon the circumstances and motivations of particular actions, as established by evidence at

a trial.[31] The Supreme Court has recently noted that where an official has been granted a qualified immunity from liability, the immunity issue cannot be resolved by a simple motion to dismiss and a trial on the merits ultimately may be required.[32] And subsequent cases have left little doubt that a full-blown trial will usually be needed to determine whether and to what extent a qualified immunity will actually be available to a defendant.[33] As a result, an official who knows that he enjoys a qualified immunity really knows very little about what that immunity protects. It is not merely the inevitable uncertainty owing

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31 Imbler v. Pachtman, 424 U.S. 409, 419 note 13 (1976).

32 Scheur v. Rhodes, 416 U.S. 232, 250 (1974).

33 Ohland v. City of Montpelier, 467 F.Supp. 324 (D. Vermont 1979); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975).

to the necessity of applying a general standard to particular facts, unsettling and unpredictable as that might be; the standard itself cannot be known until after trial, for it will depend, as the Court has told us, upon the officials level of discretion and responsibility and "all the circumstances." Scheur v. Rhodes, 416 U.S. 232, at 247 (1974).

Procedural aspects of a qualified immunity defense would also plague the public defender if Mr. Dodson's position is accepted. Many §1983 suits and Bivens[34] - type cases are tried to a jury[35], and the "good faith" issue is often submitted to it, thus enhancing the uncertainty inherent in the standard.

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[34] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[35] O'Conner v. Donaldson, 422 U.S. 563, at 577 (1975); See also, Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).

Although the Court has recently reserved the question[36], it appears that the burden of persuasion with regard to the availability of qualified immunity in §1983 cases rests upon the official.[37] And while the location of proof will not always decide the outcome of the immunity issue, it often is a determinative factor in the result of litigation.[38] In addition, discovery will often be required in order to resolve the issue of "good faith" in both its subjective and objective aspects.[39]

Perhaps most important, there is an inescapable and intimate relationship

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36 Gomez v. Toledo, ___ U.S. ___, 100 S.Ct. 1920, 1924 (1980).

37 Tyrrell v. Speaker, 535 F.2d 823, 828 (3rd Cir. 1976); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975).

38 Eckerd v. Indian River School District, 475 F.Supp. 1350, 1368 (D. Del. 1979).

39 Fujiwara v. Clark, 477 F.Supp. 822, 837 (D. Hawaii 1979).

between the point of litigation at which the immunity issue is resolved and the consequences of the qualified immunity standard itself. Qualified immunity undercuts vigorous decision-making to the extent that its availability cannot be readily established. This remains true even if the immunity is ultimately conferred and the public defender prevails. For if a trial is necessary to establish that the public defender acted properly and should not have to stand trial, then the purpose of the immunity - to promote vigorous decision-making and the exercise of independent judgment - will have been frustrated, the Respondent's assurances to the contrary notwithstanding.[40] Most certainly, this

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[40] Mr. Justice Rehnquist, concurring in part and dissenting in part in Butz v. Economou, 438 U.S. 478, at 527 (1978), alerted the Court to this particular result of qualified immunity by warning that to expect federal courts to "weed out insubstantial [§1983]claims" shows "more optimism than prescience." Id, at 527.

Court's prediction in Wood v. Strickland, 420 U.S. 308, at 320-321, 326 (1975), that the qualified immunity standard would not cause good faith decisions to be second-guessed by federal judges and juries has proved to be less than prescient.[41]

Finally, most cases applying a qualified immunity standard for public defenders will involve important conflicting values. They often will be resolved less on the basis of a proper weighing of analytically relevant factors than on the basis of inchoate, "gut" feelings about the case - for example, the moral character of the respective parties, the plight of the plaintiff if compensation is denied, the likelihood that a judgment against a

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[41] Kurland & Casper, The Supreme Court Review 1980 (1st Edition 1980).

defendant will ultimately be borne by a "deep pocket", and the like. One can only speculate whether such a decisional process will systematically favor plaintiffs or public defenders. The important point, however, is that the qualified "good faith" immunity standard, far from assuring a public defender that vigorous decision-making will be rewarded, is pregnant with risk to him/her: a rather small risk that he or she will ultimately be held liable, a somewhat greater risk that the immunity will be denied, and a substantial risk that a full-dress trial will be necessary to determine the applicability and scope of the immunity. It is within the ominous shadow cast by those risks that the public defender will decide what his duty - to himself as well as to the public - requires of him. Polk County

respectfully contends that the public interest does not demand such a result, but will be best served by absolutely protecting the public defender from such circumstances.

CONCLUSION

For these reasons, the decision of the Eighth Circuit Court of Appeals should be reversed; public defenders should be found not to act under color of state law for the purposes of 42 U.S.C. §1983, and should be granted absolute immunity from actions brought under that act.

Respectfully submitted,

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CERTIFICATE OF FILING

I, Thomas M. Werner, hereby certify that I filed my Reply Brief for the Petitioners by depositing forty copies thereof in the United States mail on October 5, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543.

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CERTIFICATE OF SERVICE

I, Thomas M. Werner, hereby certify that on the 5th day of October, 1981, three copies of the Reply Brief for the Petitioners were mailed, postage prepaid, to John D. Hudson, 510 Fleming Building, Des

Moines, Iowa, Counsel for the Respondent. I also mailed three copies of the Reply Brief to Lawrence G. Wallace, Acting Solicitor General, Counsel for Amici United States, and Richard J. Wilson, Counsel for Amici NLADA and National Association of Criminal Defense Lawyers. I further certify that all parties required to be served have been served.

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